PEOPLE OR PENGUINS, THE CASE FOR OPTIMAL POLLUTION. By William F. Baxter. New York: Columbia University Press, 1974. Pp. 110. Paperbound $1.95.

ENVIRONMENTAL LAW AND POLICY. By Eva H. Hanks, A. Dan Tarlock, & John L. Hanks. St. Paul: West Publishing Co., 1974. Pp. 1242. Clothbound $20.95.*

*Reviewed by Peter D. Junger***

In the process of thinking about the law and its purposes, some of us are, I fear, even now drafting the game plan for Armageddon. As Chicken Little craws the crack of doom, we huddle here in the middle of a law review fingering shiny trinkets of rational thought, thought insanely disassociated from the darkening world. For we have been summoned to do battle against the penguins. Summoned, not by Tom O'Bedlam's knight of air and fancies, but by an eminently respectable professor of law.

How did we get into such a fix?

They tell a story, and will tell it still as the last penguin walks about the last rock and man is only an unpleasant memory. One day, it seems, an ant came upon a centipede and asked him how he walked: Left feet, then right feet? Odd feet, even feet? Front feet, back feet? The centipede thought. And thought. . . . And never walked again.

That pretty well explains it. We academic lawyers are harmless enough as long as we *do* law. However, when we start thinking about what we are doing, we are likely to get into trouble. And we have somehow come to question what we do. We search for purposes in law. We plunge into other mysteries that we know naught of. "Instead of confining citation to books whose cards in the library catalog include the word *Law* in the title, there has been a recent movement into psychology, pomology, embryology, theology, ethics, home economics, economics, politics, the sticks, the realisticks, and symbolic logic."[1] The result is, if I may quote slightly out of context, that

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[1] Teufelsdröckh, *Jurisprudence, the Crown of Civilization, Being Also the Principles of Writing Jurisprudence Made Clear to Neophytes*, 5 U. CHI. L. REV. 171, 177 (1938) [hereinafter cited as JURISPRUDENCE].

> many of the niceties of property law are disappearing, not through the deliberate choice of anyone, but rather through the lack of time to master them in the face of demands made by what may be conceded to be more significant matters.[2]

Those words were spoken fifteen years ago. By now we have lost, I fear, more than mere niceties.

That the loss is significant I would not argue. Our common *corpus juris* was not, after all, the deliberate choice of anyone, and if we let it fall into decay after some seven centuries or so, it may be that little will be lost. If the law of property has become irrelevant and inexplicable, then I can—and do—teach environmental law.

But what is environmental law? I can only give examples. I suppose that the Second Law of Thermodynamics is as good as any. And what can I tell my cynical innocents about that? That they have the professional responsibility to obey it? That it should be repealed though we bring the whole structure of Time down about out heads? *Fiat justitia, ruat coelum?* That the roof will fall in no matter how dear old Justitia makes out?

Although most of my colleagues will protest that physical laws are not what they have in mind, many of them will suggest that I should teach economics in both Property and Environmental Law courses. Perhaps I should, but it smacks of *hubris* and futility. I rather suspect that, no matter how carefully we adhere to the moral dictates of economics, the roof will fall in. And there is a more serious problem: the new arcana of the Economic Analysis of Law presupposes a certain understanding, not only of economics, but of the goals and mind of man. The trouble is that the Devil himself knoweth not the mind of man, and I doubt that economists are in much better shape.

Still, at the minimum (and who in troubled times can ask for more than that?), it all seems harmless enough. We play with our toys, talking learnedly of demand curves and social welfare functions. What harm is there in making fools of ourselves? Until recently I thought there was little enough. But Professor William Baxter has, through his little pamphlet *People or Penguins,* frightened me. For what if people take him seriously?

Ex nihilo nihil fit; nothing is made from nothing. I believe this quite fervently.[3] Nothing is the old enemy. And Professor Baxter,

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[2] C. CALLAHAN, ADVERSE POSSESSION 17 (1961).

[3] But then so did the poor old Cyclops before Nobody put his eye out.

with his faint reek of brimstone (called "optimal pollution"), is one of the new magi of Nothingness.

Professor Leff, another teacher of law, has isolated the problem.

> We are, I think, beginning to see in the speedy spread of economic analysis of law the development of a new basic academic theory of law. Since its basic intellectual technique is the substitution of definitions for both normative and empirical propositions, I would call it American Legal Nominalism.[4]

Of course, reasoning *ex nihilo* (or a priori, which is much the same sort of thing) is not new to legal scholarship, but until now it has been reserved for jurisprudence. Even so, jurisprudential theories have a way of influencing even the most rigorously antiphilosophical laborer in the fields of the law. Less than forty years ago, for example, Dr. Teufelsdröckh, first postulated the pseudea;[5] today I count myself lucky if the mailman doesn't deliver a dozen before lunch.[6] Let me refresh your recollection.

> Observe: By introducing the principle of Multiguity of Terms, *pseudeas* can be produced, and fast enough to meet the need, and added to the theretofore available stuff and also held and owned in the modern world, as perfect currency. A well engraved and handsome *pseu*dea will buy as much as any *i*dea-gold, and more than some, just as a note may frequently be of more value than a bar of yellow metal.[7]

You will recall that Teufelsdröckh also hypothesized the Principle of Partiality (to say nothing of the Principle of the Hole).[8] The Principle of Partiality, says Teufelsdröckh,

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[4] Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 U. VA. L. REV. 451, 459 (1974).

[5] JURISPRUDENCE 173.

[6] Recently, for example, he brought me B. ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW (1975).

[7] JURISPRUDENCE 173.

[8] The Principle rests simply in the addition of a W. Where there is in nature a Hole, we put a Whole, and then stake out our claim as to where the Whole resides, or what *its* Nature is. The finest instance is Sovereignty, but lovely things have been done with the Validity of Norms, the Authority of Law, Absolute Justice, the Summum Bonum, the States of Legal History, the School of Realists. The resultant issues can be sliced any way at all, with no fear of vulgar minds stumbling upon embarrasing Inquiry:—there being nothing but a Hole to inquire into, *let them inquire*, if they will!

Id. at 175.

> is best brought out by the behavior (not the theory) of those blind men who first gathered round the Elephant of Law to determine the nature of his Elephantitude. . . . One, you will recall, announced that the Elephant of Law was "mighty like a tree," one that he was "mighty like a rope," one that he was "mighty like a wall." Though good, this lacked perfection: the Principle of *Absolutized* Partiality comes in then to do for Jurisprudence what Newton did for Copernicus, Einstein for Newton. The elephant *is* a tree, or *is* a rope, or *is* a wall, *and nothing else or more*: this gives something to go on. Above all, it invites pseu-dispute and pseu-disproof of Elephantitudes, not further inquiry into actual Elephants.[9]

The world has progressed considerably since 1938. Today mere law professors use the pseudea as blithely as did the jurisprudes of forty years ago. Of course, the subject matter has changed, as was only to be expected once the mighty flight of Teufelsdröckh's theory was brought to earth by more pedestrian hands. No longer is the talk of Elephants; we are reduced to examining Penguins.

This brings me back to the pernicious little tract by Professor Baxter, in which he discovers the pseu-dichotomy between People and Penguins. Were I Teufelsdröckh, I would say that Baxter writes about Penguinities. Were I Baxter, I would say that Baxter writes about economics. For myself, I am reduced to silence.

Let Baxter speak for himself.

> My criteria are oriented to people, not penguins. Damage to penguins, or sugar pines, or geological marvels is, without more, simply irrelevant. One must go further, by my criteria, and say: Penguins are important because people enjoy seeing them walk about rocks; and furthermore, the well-being of people would be less impaired by halting use of DDT than by giving up penguins. In short, my observations about environmental problems will be people-oriented, as are my criteria. I have no interest in preserving penguins for their own sake.[10]

I have never seen Professor Baxter. I am not even sure that I have ever seen a penguin. I am selfish enough not to lament greatly the loss of one or the other, although I have not risen to that pure state of alienation from the world which Professor Baxter asserts is necessary for my salvation. Even so, if scientists inform me "that use

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[9] *Id.* at 174-75.

[10] W. BAXTER, PEOPLE OR PENGUINS, THE CASE FOR OPTIMAL POLLUTION 5 (1974) [hereinafter cited as PENGUINS].

of DDT in food producton is causing damage to the penguin population"[11] or, for that matter, to Professor Baxter, then I am going to worry. For what do these omens augur for those whom I love or, more selfishly, for me? If penguins are poisoned in distant Antarctica by DDT applied in North America, then what is the fate of my liver?

When the letters form upon the wall: *MENE, MENE, TEKEL, UPHARSIN,* then the Baxters of the world proclaim: "Look, Jack, you got a choice: People or Walls."

Let us see how Professor Baxter constructs his argument.

> It may be said by way of objection to this position, that it is very selfish of people to act as if each person represented one unit of importance. . . . It is undeniably selfish. Nevertheless, I think it is the only tenable starting place for analysis for several reasons. First, no other position corresponds to the way most people really think and act—i.e., corresponds to reality.[12]

A bit anticlimactic perhaps, but there it is. Baxter is right, if selfish, because Baxter corresponds to reality. This is not argumentation. It is solipsism.

But I fear that it may persuade. In the first place, Baxter is an Authority, and in the second, the proposition just quoted might appear to have an empirical basis. If we look into our souls, we find that we are selfish. But only a blind man describing penguinities could assert that man is selfish, *and nothing else or more.* There is some reason to believe that we are also capable of altruism.[13] Be that as it may, let us assume that Professor Baxter has concluded, on the basis of extensive and well-constructed empirical research, that all men are selfish. So what? It still does not follow, cannot follow, that "each person represents one unit of importance," for that last statement is not and cannot be an empirical proposition. It is a definition and nothing more. It is, however, on this proposition *ex nihilo* that Baxter constructs his ingenious argument against penguins and in favor of an effluent tax.

I am not sure that everyone will take my word that Baxter bases his whole construct on that single *ipse dixit,* and I must admit that he has given more justifications for his position. The first two of those, however, are mere apologies; they represent no more than the

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[11] *Id.* at 4.

[12] *Id.* at 5.

[13] *See, e.g.,* T. NAGEL, THE POSSIBILITY OF ALTRUISM (1970). *Cf.* E. WILSON, SOCIOBIOLOGY 106-29, 551-54 (1975).

unsupported claim that his argument is not that destructive to the world.

> Second, this attitude does not portend any massive destruction of nonhuman flora and fauna, for people depend upon them in many obvious ways, and they will be preserved because and to the degree that humans do depend on them.
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> Third, what is good for humans is, in many respects good for penguins and pine trees—clean air, for example. So that humans are, in these respects, surrogates for plant and animal life.[14]

Consider these statements for a moment. What assurance do we have, other than Baxter's words drifting across the void, that these claims are true? What about the nonobvious ways in which we depend on the flora and fauna? What role do penguins play in that great chain of being on which our lives depend? I do not know, nor does Professor Baxter. Yet it is clear that Baxter's scheme cannot comprehend more than Baxter can imagine, and Baxter's imagination is so limited that he can see no value in penguins other than the enjoyment people obtain from watching them walk about rocks.

Let us examine the last sentence quoted. If we adopt Baxter's attitude of selfishness, it is inconceivable that we should care (except to feel insulted) that we are surrogates for plant and animal life. I cannot believe that Professor Baxter considers it important that he is a surrogate for a penguin. Or did he mean to say that the penguin is a surrogate for Professor Baxter? But surely then he would have sensed the poisons coursing in his veins.

In his next two arguments, Baxter gives the game away. How does one justify using an argument *ex nihilo*? By admitting that one cannot think of anything else.

> Fourth, I do not know how we could administer any other system . . . .[15]
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> Fifth, if polar bears or pine trees or penguins, like men, are to be regarded as ends rather than means, if they are to count in our calculus of social organization, someone must tell me how much each one counts, and someone must tell me how these life-forms are to be permitted to express their preferences, for I do not know either answer.[16]

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[14] PENGUINS 5-6.

[15] *Id.* at 6.

[16] *Id.* at 7.

I share Professor Baxter's ignorance of these matters. But I can argue just as he does. I do not see how we can administer Professor Baxter's system. If men are to be regarded as ends rather than means, if they are to count in our calculus of social organization, someone must tell me how much each one counts, and someone must tell me how these life-forms are to be permitted to express their preferences, for I do not know either answer. And neither does Professor Baxter, although he supplies several that contradict themselves.

Let me now outline Professor Baxter's "system." One of his axioms is that "every person should be free to do whatever he wishes in contexts where his actions do not interfere with the interests of other human beings."[17] His reasoning is nihilistic in that he supports this claim only with the contention that no one will question it. And indeed, why should one bother? None of the questions which Baxter would answer can be exorcised by this criterion, for so long as one person is concerned with the accumulation of DDT in the fatty tissues of penguins, of Baxter, or of me, then no one else can invoke this axiom as a justification for the use of DDT.

Professor Baxter also asserts that "[w]aste is a bad thing . . . . Hence, . . . [no] resources, or labors, or skill, should be wasted—that is, employed so as to yield less than they might yield in human satisfactions."[18] At first glance this appears to be an argument of some substance, but at base it is simply another argument by definition, for Professor Baxter does not tell us how to measure human satisfactions and weigh them one against the other. To say that one should not include the satisfactions of penguins in the felicific calculus does not go very far toward developing such a calculus.

Baxter, however, recognizes this problem and brings a novel form of argumentation to bear on it. He admits that his sytem "assumes we can measure in some way the incremental units of human

[17] *Id.* at 2. Baxter's justification for this assumption is that "it is so basic a tenet of our civilization—it reflects a cultural value so broadly shaped, at least in the abstract—that the question 'why' is seen as impertinent or imponderable or both." *Id.* This is, of course, a proposition that is empirically verifiable. Unfortunately Professor Baxter does not cite any anthropological data for his contention. As an alternative hypothesis one might consider the proposition that "every person should do what he considers to be morally correct." I suspect that, "in the abstract," the latter proposition is more widely held in our culture than is Baxter's sophomoric hedonism.

It may be that the law should leave each person free to do what he wishes—or what he believes to be required by the dictates of morality. That is, however, not Professor Baxter's contention. For Baxter is not speaking of the law; he is discussing the "normative question: what *ought* we to do." *Id.* at 7.

[18] *Id.* at 3-4.

satisfaction yielded by very different types of goods. The proposition must remain a pious abstraction until I can explain how this measurement process can occur."[19]

That promised explanation has a breath-taking simplicity. Baxter never again mentions the measurement of human satisfactions.[20] This is not to say that Professor Baxter never again mentions "human satisfactions," for he does. Most of his book is devoted to his theories of the "most effective use of our resources," and he "insists" on defining "resources" as including "all of [the] infinite variety of sources of human satisfactions."[21] This suggests that Professor Baxter has confused "sources of human satisfaction" with the satisfactions themselves. Whether the confusion is deliberate I cannot say.

The fact remains, however, that satisfactions and their sources are different things. Let me give you an example. Assume that I have a basket of sources of human satisfactions, *viz.*, strawberries, and that Baxter has a bowl of sources of human satisfactions, *viz.*, cherries, and I don't like strawberries and Baxter doesn't like cherries. According to Baxter's system (copyright 1776 by Adam Smith) we should trade, so let's assume that we do. And now (this is my hypothetical and I will run it the way I want) I have a bellyache and Baxter has hives and we are both mightily dissatisfied. It becomes clear that the correspondence between the efficient use of our resources on the one hand and our satisfaction on the other can be negative.

I admit that I am not playing Professor Baxter's game as *defined* by Professor Baxter. For his system cannot work if you or I can make a mistake, any more than it can deal with all those matters, like being killed by insecticides, that Baxter refuses to imagine. I had better mention at this point another of Baxter's axioms: "[E]very adult, unless he has been found mentally incompetent, should be permitted to make his own judgment about what will advance his own well-being."[22] Why, Professor Baxter does not say. Unless you have never made a mistake, I think you will agree that this is not necessarily a formula for increasing human satisfactions.

Assume, for example, that there is a manufacturer of DDT whose products are poisoning me. The manufacturer gets the satisfaction of his profit, and I get the dissatisfactions associated with ill

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[19] *Id.* at 12.

[20] Professor Baxter has thus created the ultimate argument *ex nihilo:* the argument itself vanishes into nothingness.

[21] PENGUINS 16.

[22] *Id.* at 19.

health. Would it increase human satisfaction if the manufacturer were ordered to cease and desist? Baxter cannot rule this question out, because it is one that he discusses throughout his book. The answer obviously depends on whether the manufacturer gets more satisfaction from his profits than I get dissatisfactions from my illness, and there is no obvious way of determining that. My exquisite agonies may be trivial in comparison with the manufacturer's glee in his ill-gotten gains. Or they may not. The only parties who could testify are disqualified by bias, and neither can feel the other's pain or joy.

The question of how one can compare the differing satisfactions of differing men is meaningless, but Baxter answers it by simply invoking his rule, already noted, that we should each count as one. This, together with his rule that none of us can make mistakes, permits him to conclude that both the manufacturer and I have one vote: that my dissatisfactions are equal to the manufacturer's satisfactions. That, of course, results in a stand-off, and the question whether my hypothetical manufacturer should be allowed to continue producing DDT remains unanswered.

Baxter, however, resolves this impasse by postulating that we should *not* each count as one.

> Both the incentive and the opportunity to improve his share of satisfactions should be preserved to every individual. Preservation of incentive is dictated by the "no-waste" criterion and enjoins against the continuous, totally egalitarian redistribution of satisfactions, or wealth; but subject to that constraint, everyone should receive, by continuous redistribution if necessary, some minimal share of aggregate wealth so as to avoid a level of privation from which the opportunity to improve his situation becomes illusory.[23]

Some now count only a minimal amount. When this uneven distribution of the sources of human satisfaction is plugged into Baxter's system, we will find that if I am wealthy, I can bribe the manufacturer to stop, and if I am poor, I cannot. This means that if I am wealthy it is wasteful to produce DDT and if I am poor it is wasteful not to produce DDT. Further, I am allowed to be poor by Professor Baxter's criteria because it would be wasteful not to give the manufacturer an incentive to produce DDT. Measuring human satisfactions thus becomes a matter of measuring buying power, and buying

[23] *Id.* at 4.

power is to be allocated so that the penguins—and you and I—lose.

Baxter is, of course, aware that some things are not traded in the market and that buying power will not prevail in such cases. Most of his pamphlet is devoted to what he chooses to call, after Garrett Hardin,[24] the "problem of the commons," a phrase which Baxter seems to believe means the same thing as "externality."[25] Baxter's problem of the commons arises whenever "ownership rights are imprecisely defined,"[26] *i.e.*, when there is a source of human satisfactions like clean air, or peace and quiet, that cannot be marketed. Baxter's solution to the problem is to tax polluters, or noise makers, in the amount that they would have had to pay if there were precisely defined ownership rights in such things. However, Baxter never does, nor can, explain how to determine the market value, *i.e.*, the market price, of a source of human satisfactions that is unmarketable.

To return to my version of Baxter's argument, I do not know how to administer Baxter's system because I do not know—and Baxter cannot tell me—how to price unmarketable resources. If men are to count in our calculus of social organization, I cannot tell how much they should count because they are to be counted in accordance with their wealth, which, in turn, is to be determined in accordance with the demands of efficiency, which in turn is determined by the distribution of wealth. Nor can I tell how these life forms are to express their preferences in the cases that concern Professor Baxter, because his system is a market system and does not apply to the unmarketable. Nor will it do to ask them what their preferences are, because in the case of public goods, a concept which Baxter subsumes under his label of the "commons," it is the accepted opinion of the school of economists with which Baxter swims that the life-forms in question will not tell the truth.[27] Thus Baxter's argument dissolves into the nothingness that gave it birth.

There is one further difficulty with Baxter's system that should be mentioned. Do his human beings, each counting for one but some more equal than others, include future generations? If so, how are we

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[24] Hardin, *The Tradegy of the Commons*, 162 SCIENCE 1243 (December 13, 1968).

[25] PENGUINS 31.

[26] *Id.* at 34.

[27] *See, e.g.*, Russell, *Effluent Charges*, in ECONOMICS OF AIR AND WATER POLLUTION 37 (W. Walker ed. 1969): "Because of the peculiar nature of public goods [*i.e.*, goods not subject to private ownership and thus goods included under Baxter's rubric of "the commons"], it is in each citizen's interest to conceal his true preferences concerning the amount to be provided if there is a chance that he will be charged according to his desire for the good."

to know their preferences? If not, will our successors be any better off than penguins in Baxter's brave new penguinless world? Since Professor Baxter is not willing to confront this problem, I will quote from an economist who did: "[S]uppose that, as a result of using up all the world's resources, human life did come to an end. So what?"[28] I am not saying that Baxter has the courage to carry his logic to this final solution. But others may; that is why Baxter frightens me.

I suppose that I sound as if I am moralizing. I admit that I am. But I still owe you Professor Baxter's final justification for his selfishness.

> Sixth, and by way of summary of all the foregoing, let me point out that the set of environmental issues under discussion—although they raise very complex technical questions of how to achieve any objective—ultimately raise a normative question: what ought we to do. Questions of ought are unique to the human mind and world—they are meaningless as applied to a nonhuman situation.
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> . . . .
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> I reject the idea that there is a "right" or "morally correct" state of nature to which we should return. The word "nature" has no normative connotation.[29]

Professor Baxter, you see, is moralizing too. More correctly, Professor Baxter pretends that he is moralizing. It is true that his conclusions are moral propositions, but his premises cannot lead him to those conclusions. Worse, his final premise is blatantly untrue. The assertion that the word "nature" lacks any moral *connotation* is a monument to Baxter's self-imposed blindness. Once again he is playing with definitions, but this time at the peril of our souls. For one last time, let me demonstrate how Baxter works his system:

1. "God" denotes the unmoved mover (by definition, *my* definition).

2. Words mean what I mean them to mean *and nothing else or more* (by the Principle of Absolutized Partiality).[30]

3. Therefore, "God" lacks a normative connotation.

By appropriate use of the Principle of Absolutized Partiality one can prove that there can be no normative connotations and, indeed, no connotations whatsoever. I am not merely saying that Professor Baxter should get him to a dictionary. What I am claiming is that

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[28] Beckerman, *The Myth of "Finite" Resources*, 12 BUSINESS & SOC. REV. 21, 22 (1974).

[29] PENGUINS 7.

[30] *See* text at note 9 *supra*.

Professor Baxter's thought depends not only upon a rejection of the entire empirical world (including penguins), but also upon a rejection of all moral, *i.e.* normative, questions. This is dangerous, if taken seriously, both to the world and to morality. It is dangerous not only because Baxter's system would allow one to justify liquidating Baxter by defining him as a penguin (don't laugh unless you think that Dachau is funny), but also because it represents an attack upon all moral values.

What Baxter cannot grasp is that, if there is such a thing as morality, it may lie in our relation to God, or to man, or to men, or to society, or to future generations, or to nature, or to some free-floating moral imperative, or to ourselves, or to a penguin, or to all of the above. If we have a moral duty, if we "ought" to do something, that does not mean that our obligation runs only to other human beings. Baxter argues that only human beings have value, because only human beings make evaluations, and only human beings have standing to initiate law suits. Whether his premises are true or not, the conclusion cannot follow. And if we accept his conclusion, we must believe that only selfish acts are moral. That is a possible moral position, but not one that many people would willingly accept. Baxter considers any act that we do, no matter how altruistic in appearance, a selfish act. Therefore all acts are to Baxter moral, and anything good. *Ex nihilo, ad nihilo.*

I have some sympathy for Professor Baxter's predicament, though none for his conclusions. All law professors are in the same sinking ship these days. We are told repeatedly, and some of us believe, that law should be an important means to accomplish the ends of society. We are exhorted to teach not only what the law is today and may be tomorrow, but what it *ought* to be. We are told to teach not only the craft of lawyering, but also the social purposes that should inform that craft. This suggests that we have to know what the law ought to be and what social purposes should be sought through the practice of our sullen art.

But we cannot know such matters with certainty, if only because we, unlike the inhabitants of Professor Baxter's infertile imagination, live in a world in which there are risks, known and unknown, and in which we make mistakes. Most of us are content with raising the questions and admitting that we have no answers. But some of us seem to take our duties too seriously. We feel that we must supply answers. And this in turn compels the Baxters among us to invent hypothetical questions that we believe we can answer.

In the larger scheme of things, I am sure, penguins are of more importance than law teachers. But I am a law teacher, and I want, selfishly, to plead the case against the gratuitous destruction of my species—even at the hands of suicidal colleagues. To be a law professor, it seems to me, one has to deal with the law. But the lust for answerable questions has led many of my colleagues—for Baxter is only an exceptionally terrible example of a current fad—to reject *in toto* the corpus of the law. Once we reject the law in all of its infinite complexities, we law teachers have nothing to offer.

There are, fortunately, antidotes to this academic nihilism. The best I have found is a casebook on environmental law compiled with taste and intelligence by Hanks, Tarlock, and Hanks.[31] This is not to say, however, that *Environmental Law* is a paean to penguins. Quite the contrary. Its authors are as concerned as Professor Baxter with the costs of environmental protection and are as sensitive to economic considerations, as indicated in their preface:

> [E]vents like the "Energy Crisis" have made clear that Earth Day speeches must give way to rigorous analysis and hard decisions: a clean and attractive environment has its costs.
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> It is with this in mind that we offer these materials. We have attempted to integrate the study of environmental law with the study of concepts from other disciplines necessary to an assessment of that law, primarily economics.[32]

They have succeeded in their attempt, because they have not thrown out the stuff of law for some "pop" economics, but have, rather, integrated materials from other disciplines into a study of the law itself. This does not mean that the economics in *Environmental Law* is oversimplified, however. The student is confronted with knotty little problems that Professor Baxter avoided in his pamphlet. Included, for example, is Judge Bue's magnificent opinion in *Sierra Club v. Froehlke*,[33] with its careful consideration of such matters as quantifying the environmental costs of governmental activities and determining the present value of asserted future benefits from those activities. Boxes within boxes, economics inside the law inside the

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[31] E. HANKS, A. TARLOCK, & J. HANKS, CASES AND MATERIALS ON ENVIRONMENTAL LAW AND POLICY (1974) [hereinafter cited as ENVIRONMENTAL LAW.]

[32] *Id.* at xi.

[33] 359 F. Supp. 1289 (S.D. Tex. 1973), *excerpted in* ENVIRONMENTAL LAW 335. The benefit-cost analysis within the opinion is found at 359 F. Supp. 1362, ENVIRONMENTAL LAW 374.

world in all its diversity. No one can read *Froehlke* and believe that environmental problems are simple or that human answers can be more than tentative, even when illuminated by economic insights. Further, no one can read *Froehlke* and believe that the problem that confronted Judge Bue, whether the corps of engineers had complied with the mandate of the National Environmental Policy Act, could be resolved by defining it out of existence.

Since the mills of the law, however slowly they turn, grind up practically everything in the world, or at least in the United States, one finds that far more than economics is integrated into legal materials. There is in *Environmental Law,* for instance, a passage from the second opinion of the Federal Power Commission in the seminal Storm King Mountain case,[34] in which the testimony of art experts about the mountain's aesthetic importance is considered:

> The words of such eloquent witnesses, of course, quite overshadow the pedestrian prose of examiners and commissioners. Still, as counsel for the Sierra Club in brief succinctly stated the matter, "[t]heir point was not an occult one. Their expertise lay in expressing it, not in feeling it." . . . We therefore are impelled to say that our conclusion that the license must issue does not rest upon any discounting of the case made by the intervenors relating to the natural beauty, historical significance, and spiritual qualities of Storm King Mountain in its setting.
>
> Just as the mountain has swallowed the scar of the highway, the intrusive railroad structure and fills, and tolerates both the barges and scows which pass by it and the thoughtless humans who visit it without seeing it, so it will swallow the structures which serve the needs of people for electric power.[35]

This passage raises questions, and questions more significant than the influence of Longfellow upon the prose style of the FPC. "I reject," says Baxter, Professor of Law; but the law will not allow the FPC the luxury of such nihilism. It may be that it is impossible to strike a proper balance between the need for beauty and the need for electricity. Yet a balance must be struck—doing the impossible is always interesting—and the balancing process turns out to be part of

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[34] Consolidated Edison Co. of New York, 44 F.P.C. 350 (1970), *aff'd sub nom.* Scenic Hudson Preservation Conf. v. F.P.C., 453 F.2d 463 (2d Cir. 1971), *cert. denied,* 407 U.S. 926 (1972). The opinion in *Consolidated Edison* is excerpted in ENVIRONMENTAL LAW 254. *See also* Hudson River Fishermen's Ass'n v. F.P.C., 498 F.2d 827 (2d Cir. 1974); Scenic Hudson Preservation Conf. v. Callaway, 370 F. Supp. 162 (S.D.N.Y. 1973).

[35] 44 F.P.C. at 384, ENVIRONMENTAL LAW 255.

the legal process.

There is more to the world than Professor Baxter—or I—can imagine, and more to the law too. One can even learn, reading footnotes, that the basis of morality is not in our selfishness but in our mutual dependence: even the Devotions of John Donne are part of the body of environmental law.[36] *Environmental Law* includes all this and more. Yet it is no commonplace book, nor is it merely a collection of cases from which an instructor can extract such lessons as he likes. It is a compilation informed by intelligence.[37]

At times I have feared that environmental law is incomprehensible. One seems either to be confronted with a chaotic jumble of cases, statutes, and environmental insults or with pure order, *a la Baxter*, imposed on nothingness. But *Environmental Law* has shown that this need not be so. Admittedly, its order is not inherent in the world itself; it is a construct of the authors' intelligence, quite as much as Baxter's is of his. But *Environmental Law* does not reject both world and law; it makes their relation comprehensible. And if the order is ultimately only of heuristic value, what other value informs either teaching or the law?

The authors begin with a chapter called "Perspectives," one of the best compilations of environmental writings I have seen. The assumption clearly is that law students are "reasonably educated person[s]"[38] who have some competency in each of Lord Snow's pseudichotomous Two Cultures. In the first chapter, the reader is introduced to Garrett Hardin invoking the ghost of Hegel to goosestep across the commons,[39] Lynn White worshipping at the shrine of Francis of Assisi,[40] and Kenneth Boulding exploring the economics of the Coming Spaceship Earth,[41] each in his own fashion refuting the

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[36] No man is an Iland, intire of itselfe; every man is a peece of the Continent, a part of the maine; if a Clod bee washed away by the Sea, Europe is the lesse, as well as if a Promontorie were, as well as if a Mannor of thy friends or of thine owne were; any man's death diminishes me, because I am involved in Mankinde; And therefore never send to know for whom the bell tolls; it tolls for thee.

J. DONNE, DEVOTIONS XVII, *quoted in* Sierra Club v. Morton, 405 U.S. 727, 760 n.2 (1972) (Blackmun, J., dissenting), in ENVIRONMENTAL LAW 213.

[37] To me that is perhaps a special delight, since I once reviewed a similar casebook and criticized it for its failure to impose order on chaos. Junger, Book Review, 22 CASE W. RES. L. REV. 598 (1971).

[38] ENVIRONMENTAL LAW xi.

[39] Hardin, *supra* note 24, at 1243-48, *excerpted in* ENVIRONMENTAL LAW 75.

[40] White, *The Historical Roots of Our Ecological Crisis*, 155 SCIENCE 1203 (March 10, 1967), *excerpted in* ENVIRONMENTAL LAW 82.

[41] Boulding, *The Economics of the Coming Spaceship Earth*, in ENVIRONMENTAL QUALITY IN A GROWING ECONOMY 3 (H. Jarrett ed. 1966), *excerpted in* ENVIRONMENTAL LAW 1.

impious simplicity of brother Baxter. There are also methodological critiques: Kaysen criticizing the Club of Rome,[42] Heller struggling to reconcile the insights of economics with those of ecology,[43] Ehrlich and Holdren criticizing Commoner,[44] and Commoner criticizing Ehrlich and Holdren's criticism of Commoner.[45] And we have the authors' notes to all of this, hinting, guiding, explaining, supplying a reading list that could be a summer's delight. "Perspectives" ends with the first appearance of purely legal materials: the dissenting opinion of Mr. Justice Douglas in *Sierra Club v. Morton*,[46] invoking the day when, in effect, the voice of the penguin shall be heard throughout the land.[47] There are no easy answers here, but rather decent thought by decent men, giving not only perspectives but also some sense of the underlying complexities both of the world and of human thought and values.

The authors turn to "Population" for their second chapter, starting with the question: "What is a Population Problem?"[48] They provide a frightening dose of statistics and demographic theory, complete with population profiles. Then suddenly we are confronted with the law: that remarkable riddle within an enigma, *Roe v. Wade*.[49] The authors continue through the progeny of enigma, *Roe* and *Doe*,[50] cases, statutes, and articles, to a final section on population entitled "Beyond 'Free Choice,'" which raises, gently and obliquely, certain questions of justice hidden in economic studies, including Boulding's proposal for "a system of marketable licenses to have children."[51]

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[42] Kaysen, *The Computer That Printed Out W*O*L*F**, 50 FOREIGN AFFAIRS 660 (1972), in ENVIRONMENTAL LAW 18.

[43] Heller, *Coming to Terms with Growth and the Environment*, in ENERGY, ECONOMIC GROWTH, AND THE ENVIRONMENT 3 (S. Schurr ed. 1972), *excerpted in* ENVIRONMENTAL LAW 25.

[44] Ehrlich & Holdren, *Review: The Closing Circle*, 14 ENVIRONMENT 24 (1972), *excerpted in* ENVIRONMENTAL LAW 43.

[45] Commoner, *Review: The Closing Circle*, 14 ENVIRONMENT 25 (1972), *excerpted in* ENVIRONMENTAL LAW 59.

[46] 405 U.S. 727, 741 (1972), *excerpted in* ENVIRONMENTAL LAW 88.

[47] [T]hese environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life which it represents will stand before the court—the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams.

405 U.S. at 752, ENVIRONMENTAL LAW 92.

[48] ENVIRONMENTAL LAW 93.

[49] 410 U.S. 113 (1973), *excerpted in* ENVIRONMENTAL LAW 125.

[50] Doe v. Bolton, 410 U.S. 179 (1973), *excerpted in* ENVIRONMENTAL LAW 132.

[51] K. BOULDING, THE MEANING OF THE TWENTIETH CENTURY 135-36 (1974), *excerpted in* ENVIRONMENTAL LAW 170.

Once again the authors are able to illustrate the collision between conflicting values by turning to legal sources, in this case, *Dandridge v. Williams*.[52] *Dandridge* is as good a lesson as a law student is likely to find in that basic point of legal studies: the choice of the question asked tends to determine the answer given.[53]

Then comes one of the key chapters in the book: "Judicial Review of Complex Decision Making," which considers "the basic question . . . whether the protection of environmental values requires the introduction of new legal constraints on administrative and (to a lesser extent) legislative decisionmaking."[54] It gives, within a surprisingly small compass, an excellent introduction to the legal problems associated with sovereign immunity, standing, freedom of information, and what the authors denominate the "common law" of judicial review (meaning the law of judicial review of administrative agencies without regard to the National Environmental Policy Act). I do not know where one could find a better introduction to the law of federal jurisdiction as it affects environmental problems.

The key section of this third chapter is devoted to the National Environmental Policy Act. It is here that the student is exposed not only to the complexities of the law, but also to the infinitely more variegated complexities of the world itself. The chapter also includes an introduction to some of the major issues of public utility regulation, including not only problems of the siting of plants and transmission lines, but also problems of pricing.

The next chapter deals with "Land and Resources Management and Control." Once again the authors start with selected introductory passages: a section from the report of the Public Land Law Review

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[52] 397 U.S. 471 (1970), ENVIRONMENTAL LAW 173.

[53] In *Dandridge*, the Court (per Stewart, J.), keeping its eye firmly upon the interests of hard-pressed agents of the state, proclaimed:

> Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure. . . . But the intractable economic, social, and even philosophical problems presented by public welfare are not the business of this Court.

397 U.S. at 487, ENVIRONMENTAL LAW 175. The dissenters, on the other hand, kept their eyes just as firmly fixed on the unequal treatment accorded to particular children who happen willy-nilly to be born into large families:

> [G]overnmental discrimination between children on the basis of a factor over which they have no control—the number of their brothers and sisters—bears some resemblance to the classification between legitimate and illegitimate children which we condemned as a violation of the Equal Protection Clause in *Levy v. Louisiana* . . . .

397 U.S. at 523, ENVIRONMENTAL LAW 177.

[54] ENVIRONMENTAL LAW 186.

Commission;[55] a selection from Demsetz's oft-quoted article, "Toward a Theory of Property Rights,"[56] representing a position that Professor Baxter would find congenial (if perhaps a bit rigorous); a countervailing and still more rigorous passage from Rawls' *A Theory of Justice*;[57] and finally, zeroing in on the specific problems of the public domain, a selection from Hall's article, "Strategy and Organization in Public Land Policy."[58] The authors then plunge into the body of law, both decisional and statutory, that regulates the uses of our public lands.

This chapter also includes a timely collection of cases on the control of private land use. Once again the problems cannot be subjected to simple-minded analysis on the basis of efficiency. The difficulties lie in questions of fairness: of fairness in the distribution of wealth and of fairness in causing individuals to make unequal contributions to the public welfare. Should Ramapo[59] or Petaluma[60] be allowed to control their growth and, in the process, deprive their poorer neighbors of the hope of settling in such suburban Edens? Should the owners of lands which happen to be wet be compelled to dedicate them to "natural uses" while their drier neighbors get rich performing unnatural acts?[61] Those are real questions, legal questions which cannot be defined away.

The last chapter is a magnificent compilation of materials on pollution control, a study of both private rights and remedies. As always, there is introductory material from other disciplines, particularly economics, but no simplistic exhortations against penguins. These materials should compel even the most recalcitrant law student to think, and they are meshed neatly into the legal problems. As a teacher I have not seen a better presentation of statutory material than appears in the section on Public Pollution Control, which even includes some readings which deal with Baxter's panacea, the effluent

[55] PUBLIC LAND LAW REVIEW COMMISSION, ONE THIRD OF THE NATION'S LAND (1970), *excerpted in* ENVIRONMENTAL LAW 457.

[56] 57 AM. ECON. REV. 347 (1967), *excerpted in* ENVIRONMENTAL LAW 461.

[57] J. RAWLS, A THEORY OF JUSTICE 266-74 (1971), *excerpted in* ENVIRONMENTAL LAW 465-69.

[58] 7 NAT. RES. J. 162 (1967), *excerpted in* ENVIRONMENTAL LAW 469.

[59] Golden v. Planning Board of the Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S. 2d 138 (1972), *noted at* 64 A.L.R.3d 1157, *appeal dismissed*, 409 U.S. 1003 (1972), in ENVIRONMENTAL LAW 671.

[60] Construction Industry Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd*, 522 F.2d 897 (1975), *cert. denied*, 424 U.S. 934 (1976), in ENVIRONMENTAL LAW 688.

[61] *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), *excerpted in* ENVIRONMENTAL LAW 690.

tax.[62] Here one can find, in form which should be comprehensible to most law students, the reasons why many economists think that effluent taxes are desirable. One can also find a recognition of the difficulties inherent in trying to adopt such a regime: the intractability of problems involving joint costs and benefits (a problem which the student will already have considered in the earlier section on utility pricing), the problem that people will be tempted to lie about their preferences, the question of the fairness of differing charges for old polluters and new ones, the problem of the cost of information, and the problem of political acceptability.

One of the charms of *Environmental Law* is the variety of problems which arise in each of its chapters. Another is that these problems are often dealt with, not by courts of last resort, but by legislatures and by "inferior" courts which are nearer the cutting edge of the law and are, therefore, less able than the olympians of the appellate level to resolve real world problems on the basis of abstract doctrines (in a manner reminiscent of Baxterian nihilism). Whether we should protect penguins is an interesting question beyond our professional competency. Our questions are different: how does our legal system respond to the phenomenon of poisoned penguins? How can Baxter go about implementing his modest proposal? How can others go about frustrating Baxter? How can we go about changing our legal system to accomplish our chosen ends? And finally, ultimately, how can we do all this within the structure of existing law?

There is plenty now for us lawyers to get our teeth into, whether we believe in—or understand—arguments based on economic efficiency. One of the pleasures of *Environmental Law* is that it exposes such problems in the environment in which they arise. That environment is not, of course, a vacuum within a law professor's mind, nor is it a self-sufficient system of legal dogmas adopted, *ex cathedra* and five-to-four, by the Supreme Court. It is the entire hurly-burly of the law, in which trial courts and state courts have, in the aggregate, far more to say than nine overworked oracles in Washington, in which the ultimate decision makers may not be courts or legislators at all, but city councils and boards of zoning appeals. It is the environment in which lawyers actually find themselves, the world into which we send our students.

This is the very stuff of lawyering. At a minimum it is our duty as law teachers to prepare our students to deal with purely legal

[62] *E.g.*, Russell, *supra* note 27, at 37-55, *excerpted in* ENVIRONMENTAL LAW 886.

problems. It might be nice, or even useful, if our students know some economic theory. It is essential, however, that they be able to read a statute creating legal rights and liabilities. It is essential that they have some sense of tactics. It is essential that they grasp the fact that the courts are, to use Professor Dworkin's terminology,[63] more likely to be persuaded by arguments of principle than by arguments of policy. An understanding, or misunderstanding, of economic policy may have been responsible for the decision by Congress to pass the Clean Air Act; but what a law student must grasp is that the courts, whether or not they accept that policy, are bound by certain legal principles, including the fundamental one that courts are not to substitute their policy judgments for those of the legislature.

This fundamental point is clearly illustrated by the cases included in the last section of *Environmental Law.* I know of no better way to teach a law student the mysteries of statutory interpretation than to present him with a copy of the Federal Water Pollution Control Act and then ask him, as do Hanks, Tarlock, and Hanks, a few simple questions:

> Suppose a farmer pumps ground water for irrigation or stores upstream water for the same purpose, in either case indirectly causing salt water intrusion of a river. Has he violated § 301(a)? Is salt water a "pollutant" as defined in § 502? Is it "pollution"? See §§ 502(6) and 502(19). In reply to a question by Senator Bayh of whether it is pollution, Senator Muskie replied: "I would state that it is the intention of the conferees and of the bill that such salt water intrusion is pollution as defined in section 502 of the bill." . . . Quite apart from whether salt water is a pollutant or pollution within the meaning of the Act, would the farmer's actions constitute a "discharge of any pollutant"? See §§ 502(12) and 502(6). Is the causing of "pollution" a violation of § 301(a)? Salt water intrusion is specifically mentioned in the Act in § 208(b)(2)(1).[64]

Those are questions for a lawyer, hard questions which no one else can answer, questions which will someday be asked in actual litigation. We lawyers, professors, students, have a job to do. If anything can show us how to do that job, our job, it is *Environmental Law.*

This is high praise, but I think that Hanks, Tarlock, and Hanks deserve it. That is not to say, however, that theirs is the perfect casebook. For one thing, being about environmental law, it simply

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[63] Dworkin, *Hard Cases,* 88 HARV. L. REV. 1057 (1975).

[64] ENVIRONMENTAL LAW 1076.

cannot be completely up to date. There is an excellent supplement, but the law changes too rapidly to ever be pinned down. Furthermore, it contains at least one booby trap. The copy of the Federal Water Pollution Control Act contained in *Environmental Law* omits (without any indication of an omission) § 501, which gives the Administrator of the EPA the authority to adopt regulations.

All in all, though, it is a better job than I would have thought possible. There are a few additional cases that I would have liked to have seen included, but *de gustibus*. It is a large book already. It is somewhat unfortunate that a book with as many excellent readings as this one lacks a table of secondary authorities to match its comprehensive table of cases. I also wish that the distinction between the readings, which focus for the most part on questions of economic policy, and the cases, which focus on problems of fairness, had been made more explicit. Still Hanks, Tarlock, and Hanks have given us both the policy and the legal principles, and the meal they set before us is delicious.

Yet something is still missing. Not something that we could expect—or want—to find in a casebook, but something is still missing. If there is a flaw in *Environmental Law,* it is that it is permeated with a touch of *hubris,* with the belief that we have some control over the environment and ourselves, beyond being merely the passive agents of destruction. Professor Baxter applies rational thought in a vacuum; Hanks, Tarlock, and Hanks apply it to the law in all of its variousness. The rationality of the latter authors is a virtue in our trade—law is a very rational business. But the question remains whether the world itself is so rational.